

ETHICS COMMITTEE

DATE: June 25, 2009

CALLED TO ORDER: 5:32 p.m.

ADJOURNED: 6:42 p.m.

ATTENDANCE

ATTENDING MEMBERS

Ginny Cain, Chairwoman
José Evans
Robert Lutz
Brian Mahern

ABSENT MEMBERS

Mary Moriarty Adams
Kent Smith

AGENDA

Discussion of possible procedures for the Ethics Committee

ETHICS COMMITTEE

The Ethics Committee of the City-County Council met on Thursday, June 25, 2009. Chairwoman Ginny Cain called the meeting to order at 5:32 p.m. with the following members present: José Evans, Robert Lutz, and Brian Mahern. Mary Moriarty Adams and Kent Smith were absent. Attorney Jon Elrod was in attendance on behalf of General Counsel, Robert Elrod.

Chairwoman Cain said that the Committee is meeting to further their discussion on the procedural part of what should be done if a Councillor is alleged of violating the Ethics Code. She asked all members to introduce themselves and indicate which area of the county they represent.

Chairwoman Cain asked Mr. Elrod to go over the Indianapolis City-County Council Ethics Committee outline of procedures, which is attached as Exhibit A. She said that the committee will discuss the who, what and when of the procedures and whether or not more possibilities should be considered. She said that ultimately this may result in an ordinance that defines the procedures.

Mr. Elrod explained the procedures as outlined in Exhibit A. He said the first section looks at how a complaint should be filed, and it was decided that there should be one procedure for a Councillor and a different one for a citizen. He said that the reference of committee chairperson in Sec. 1 refers to the chairperson of the Ethics Committee. Chairwoman Cain asked Mr. Elrod to explain the word "respondent." Mr. Elrod stated that the respondent is the person against whom the complaint is filed.

Mr. Elrod said that he believes that a standardized form could be put together for the "statement of complaint" to ensure that the pertinent information as listed in Sec. 2 is obtained. He said that the complaint requirements apply to both Councillors and citizens. Mr. Elrod continued with the details of Sec. 3. He said that if a complaint is filed by a citizen, the chairperson would refer the complaint to an outside party to investigate and report the findings back to the Ethics Committee. Sec. 4 lists the persons who may investigate a complaint. Mr. Elrod clarified that the Ethics Committee does not sanction, but simply makes a report to the full Council. Sec. 8(B) lists some possible recommendations that can be given by the Ethics Committee. Mr. Elrod said, with respect to the enforcement of sanctions, a lot can be done once the Council makes the final decision.

Mr. Elrod said that he feels that requiring the preliminary hearing to be set within a particular number of days once the complaint is referred to the Ethics Committee should be added to the outline.

Chairwoman Cain asked if an investigation is only done if the complaint is made outside of a Council meeting. Mr. Elrod answered in the affirmative.

Chairwoman Cain asked if the options listed in Sec. 4(A) provide a choice of who may investigate a complaint. Mr. Elrod answered in the affirmative. Councillor Evans said there needs to be some type of balance with the choices to ensure fairness. Mr. Elrod said he believes that was the intent for the variety of choices. Councillor Evans asked if all three would investigate together. Mr. Elrod answered that it would be a choice of one of the three. Chairwoman Cain asked if it would be ideal for more than one of the choices to investigate. Mr. Elrod answered that for the preliminary hearing, the person who performed the investigation would present the facts of the investigation to the Committee, and the respondent would then have the opportunity to issue their own report personally or with their own counsel. He said that he does not believe that any other Councillor should be a part of the investigation, as they would have to eventually vote on the final recommendations.

Councillor Lutz asked, with respect to the statement of complaint, if there has been any thought to adding a limitation period on how far back a complaint can go, with the exception of a possible concealed violation. He said, in that case, some type of discovery doctrine can be considered. He said also under statement of complaint, Sec. F, he would like to see that the allegations be of the complainant's personal knowledge, so that he is able to face his accuser and there is no opportunity for hearsay. Mr. Elrod asked if Councillor Lutz would like to suggest a period of time for the statute of limitations. Councillor Lutz answered that he would suggest possibly six months or one year, but he does not have a concrete amount of time in mind.

Councillor Lutz added that there should also be a requirement that if there is an allegation against the Ethics Committee chairperson or one of the committee members, that person's position on the Committee should somehow be filled by someone of the same party, so that the number of votes on the Committee is consistent. He said he would also like to see the Committee serve as some type of a gatekeeper, while remaining non-political. Councillor Mahern asked if the Ethics Committee would look into a complaint that has been filed prior to the investigation of the complaint, or if there will be some level of investigation before the Committee decides whether or not there should be a preliminary hearing. Councillor Lutz answered that he believes this should be based on how the complaint is filed. Chairwoman Cain asked if the details of the complaint should be open to the public. Councillor Lutz answered that he does not believe that information should be open to the public until the preliminary report goes before the Committee.

Councillor Evans asked if a copy of the complaint can also be provided to the Ethics Committee members. Mr. Elrod answered that it can be made clear that the chairperson circulate copies of the complaint to other members of the Committee.

Mr. Elrod asked Councillor Lutz if he is suggesting that the Ethics Committee meet to first make a decision on whether or not they feel that the complaint is meritorious. He said that this may raise some issues. Councillor Lutz answered in the negative, and stated that he would have to think more about that to see if it would be acceptable. He said that he believes that it is possible for the Committee to act in that way, because these would be considered personnel matters. Councillor Mahern said it may create questions as to who the Committee would want to make the decision or if they would want the investigator to have that power. He said there could be some open door questions about having a closed preliminary meeting. Chairwoman Cain said that this is one of the reasons that the Committee was formed.

Chairwoman Cain asked if the Committee could act as a gatekeeper and have a complaint kept quiet until it is deemed that there is a problem and then make it public. Councillor Lutz answered that they must be very careful that they are not violating the open door law. Mr. Elrod said that he believes this was written to have the preliminary hearing be the place where a complaint was determined to have merit. Chairwoman Cain asked if the preliminary hearing can be considered an executive session, as it involves all the members of the Ethics Committee. Mr. Elrod said that the answer to that would have to be determined. Chairwoman Cain said, however, the preliminary hearing is set after an investigation has already been done, so there must have been some findings of a violation. Mr. Elrod agreed, and said that he believes that an investigation is always ordered as soon as a complaint is received unless the complaint was stated on the Council floor. He said it is simply a public policy argument and it is up to the Committee to determine whether or not to have complaints dismissed without any record as to how they were dismissed. Chairwoman Cain said she is not sure if it should be handled in that manner, because a response to the complaint must be given regardless of the findings, and that would be public information. Councillor Lutz said a letter could be sent to the complainant stating that the investigator or the gatekeeper has found no ethical violation on the face of the allegation.

Councillor Mahern asked at what point the respondent would be able to give a first response to a complaint. Mr. Elrod answered that this could happen anytime prior to the preliminary hearing. Councillor Mahern said that he feels that a respondent should have the opportunity to provide a response to an allegation in order to give the investigator or gatekeeper their side of the complaint. Mr. Elrod said that he believes that once a complaint is filed, the investigator would contact the respondent to obtain information from them and include all the information in a report. He said that he believes that the respondent would receive a copy of that report and would have the opportunity to write a response to the report to present before the Committee at the preliminary hearing. Therefore, both sides of the story will be heard. Chairwoman Cain asked if that can be added to the outline to assure that the respondent is contacted and given the opportunity to respond to a complaint as part of the investigation process. Mr. Elrod answered that this can be added to Sec. 5 (C) to make it clearer.

Councillor Lutz said that the Committee should be careful so as not to interfere with criminal proceedings in the case that the gist of the allegation is one of criminal misconduct. Mr. Elrod said that the respondent has the right to invoke the Fifth Amendment and not respond to the allegation at all. In addition, the Committee does not have the power to compel the respondent to appear to answer questions; therefore, eliminating the fear of incrimination. Councillor Lutz said that he also does not want the Committee to sanction someone with the possibility of a criminal action. Chairwoman Cain said that this Committee has the responsibility to address violations of ethics, not criminal actions. Councillor Lutz said that a Councillor could be accused of taking a bribe to vote a certain way on a contract, and that would be a criminal action, as well as an unethical one. He said if the Councillor attends the Ethics hearing, they could put their criminal status in jeopardy. Mr. Elrod said that he believes that this could be addressed by the fact that the respondent cannot be compelled to attend the Ethics hearings, and would be required not to speak on the matter if they are facing a criminal investigation. Councillor Mahern said this does raise the question of a certain amount of coordination between a possible criminal proceeding and a civil proceeding. He said he believes that the criminal investigation would take precedence. He asked if the Committee should consider whether any action should be taken in this type of situation. Chairwoman Cain said that she believes that this type of situation is when something should be done more quickly, as people are expecting others to be held accountable. Mr. Elrod said that this is a policy argument. Councillor Mahern said that he would argue that due diligence must be given to the criminal proceedings, as they are very serious matters, and an ethical investigation could affect the outcome of the criminal investigation. Mr. Elrod said that language could be added that should the prosecuting attorney request that no proceedings be had in the Ethics Committee pending the investigation, the Ethics Committee would follow that request. Councillor Mahern asked if the Committee would also honor the request if it comes from the accused. Chairwoman Cain answered that she believes that the request should come from a third-party. Councillor Lutz said this concerns him because of the time it can take for the criminal investigation to be complete and the effect this can have on a person's reputation.

Chairwoman Cain asked in the case where an indictment has been made, a Councillor is being investigated and there is an active prosecution case against that Councillor, if there should be a mechanism where that Councillor should step down during that investigation. Councillor Lutz said that would go against the idea of being innocent until proven guilty; and before a person can be disqualified from serving as an elected official, they have to be convicted of a felony. He said the mere fact that there is a pending criminal investigation may mean that there is probable cause to investigate, but it does not mean that a crime has been committed. He stated that he is not sure if a misdemeanor conviction would preclude a person from holding office. Chairwoman Cain said, in this type of case, she feels that it would be legitimate for the Ethics Committee to perform the investigation, unless it interferes with the criminal investigation. Mr. Elrod said that he believes this would classify as going around a burden of proof issue, which is normally not established in ethics proceedings such as

this. He said if the Committee prefers, a burden of proof for finding someone in violation of the ethics rules could be put into the procedures. However, it is not commonly done in instances such as this.

Chairwoman Cain said that she believes that sanctions should be better defined in Sec. 8. She asked what the word censure really means. Mr. Elrod answered that it basically means that someone is reprimanded, and is a way of shaming someone for doing something that the Committee believes to be wrong. Councillor Mahern added that being censured is simply a public statement of what someone did. Chairwoman Cain asked how this is made public. Mr. Elrod answered that it depends on where the censure takes place. If the censure is agreed to by the respondent, then it will be publicized at the preliminary or formal hearing; otherwise, it is done as a recommendation to the full Council, where the Council would vote by a majority on whether or not the person should be reprimanded.

Councillor Lutz said that he would like for a provision to be added under Sec. 7(F) that authorizes the committee to dismiss the complaint if no violation is found. He said that he also has a problem with the Ethics Committee making this kind of decision, instead of the full Council. Chairwoman Cain said that the Committee is simply making recommendations to the Council. Councillor Lutz asked if the Council will then hold its own hearing on the matter. Mr. Elrod said that is up to the Committee. Generally, the smaller committee has the formal hearing, which is like a trial, where the investigator would call witnesses and produce evidence and the respondent would be able to respond. It would then be up to the Committee to conclude whether or not the person is in violation, what the sanction would be and then report those findings to the full Council. The Council could then amend the recommendation before adoption, if desired. Councillor Mahern said he believes that if a person is to essentially be put on trial, that the formal hearing should take place before the full Council. He said that ethical violations are a serious matter and should not be like standard committee reporting. It is hopeful that these things will rarely happen. Councillor Lutz agreed. Chairwoman Cain said that she wants to ensure that the Committee stays within the purview of what they were sanctioned to do. She said she is pretty sure that the Committee's responsibility is to do the vetting and make the recommendation, and the Council has to make the decision based on the Committee's recommendation. She said she believes the Committee was set up to be the fact-finding, investigating element. Councillor Lutz said he believes that the Committee was set up to decide how the process should happen.

Mr. Elrod said he believes one of the reasons to have these situations go before the Committee is to keep the process simple without initially involving all 29 Councillors. He said that, hopefully, if ethical violations come about, they will be more like a question of whether or not something should have been disclosed on a financial form or if a conversation with some people about a pending bill should have taken place. He said it may be possible to have an issue go immediately before the full Council if it is an issue that the Committee feels would warrant removal from office. Another reason is the right

of the respondent to require a full trial before the full Council as a way to provide all of the information to all of the Councillors. Chairwoman Cain said that this makes sense. Councillor Lutz said that he would like for the respondent to have the option of taking their case to the full Council in all situations. Councillor Mahern agreed with Councillor Lutz. Chairwoman Cain said that it could be conducted like a zoning hearing in front of the Council.

Councillor Lutz asked about the use of the word substantial in Sec. 6(A). Mr. Elrod said that he believes that it parallels the terminology that the Supreme Court and disciplinary commission use in preliminary investigations of lawyers. Councillor Lutz asked if it implies that the Committee has the authority to dismiss a case that they feel is not substantial, and may have been an honest mistake. Mr. Elrod answered in the affirmative. Councillor Lutz said that this also satisfies his concern with Sec. 7(F).

Councillor Mahern asked what the anticipated process is in dealing with the expenses associated with encumbering the services of someone who is not already employed by the Council to perform the investigation. Mr. Elrod answered that if a special counsel was appointed to do the investigation, the chairman of the Ethics Committee could perhaps have the Committee vote on it and then seek approval of the appropriation from the full Council. Councillor Lutz said that he is cautious about this, because if an allegation is made against a Councillor, and that Councillor has an attorney representing them, then they are paying somewhere between \$175 and \$500 per hour for those services. He said this is a substantial amount of money, and that needs to be taken into consideration. Councillor Mahern said that this, along with consideration of someone's reputation, is why he feels that it is important that enough safeguards are put in place.

Councillor Lutz asked if the Committee should be given subpoena powers, since hearings will be conducted before the Committee. Mr. Elrod said that he will look into that.

Chairwoman Cain asked if in Sec. 7(B)(2) the words "council offices or" should be stricken, as it is confusing the way it currently reads. Mr. Elrod said that it should probably read, "committee assignments or other appointments."

Councillor Lutz asked if the committee has the authority to dock pay, as an elected official's pay cannot be reduced during their term of office. Mr. Elrod answered that he is not sure, but he will look into it.

Councillor Mahern asked if the Committee has the ability to remove a Councillor from committee assignments, as that is typically a determination made by the President of the Council. Chairwoman Cain answered that it is one of the things that can be done under censure and could be recommended to the Committee on Committees, as they make the committee appointments. The President, Majority Leader and Minority Leader make up the Committee on Committees. Chairwoman Cain said that maybe a specific

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time frame should be put on removal, so that someone is not removed from a committee and then immediately reassigned at the next Committee on Committees meeting.

There being no further business, and upon motion duly made, the meeting was adjourned at 6:42 p.m.

Respectfully Submitted,

Ginny Cain, Chairwoman

GC/nsm